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In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON CERTIORARI

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I. THE FACTUAL REPRESENTATIONS MADE BY THE GOVERNMENT IN THIS COURT DEMONSTRATE BEYOND ANY DOUBT THREE THINGS: THE COURT OF APPEALS WAS MISTAKEN AS TO CRITICAL FACTS THAT IT DEEMED NECESSARY TO SUSTAIN PETITIONER'S CONVICTIONS; THE COURT OF APPEALS ERRED LARGELY BECAUSE IT RELIED ON THE GOVERNMENT'S BRIEF; AND UNLESS THIS COURT GRANTS CERTIORARI, PETITIONER WILL NEVER HAVE APPELLATE REVIEW IN A CASE THAT SORELY WARRANTS IT.

Petitioner asked this Court to grant his petition to consider whether, under *United States v. Agurs*, the government denies a defendant due process when it refuses to correct plain misstatements of fact specifically brought to its attention in the appellate process and that have created a misapprehension in the court of appeals as to the record.

The government has conceded that it made one absolutely incorrect argument to the court of appeals and failed to correct it, even after petitioner had identified the error (Gov. Br. at 19.) The government argues, however, that the error was harmless (*id.* at 22.) The Brief in Opposition sweeps the other factual errors into a single euphemism: "The most that can be said is that the government's brief may have summarized the evidence against Hobson with less than complete precision" (*id.* at 20.)

The government substitutes this euphemism for a forthright presentation of the imprecision it concedes.

It declines to identify the imprecise statements made to the court of appeals and asks the Court to accept its conclusory statements concerning the effect of the errors rather than candidly setting them forth so that the Court may make its own judgment.

Petitioner asks this Court to examine a very short table set forth below. It demonstrates, accurately and completely, that the life blood of this case flows behind the government's euphemism. Petitioner asks only that this Court, not the government, examine the corrections that the government has made. The entire point of petitioner's argument is that the government, along with defense counsel, owes an obligation to appellate courts to help them review a lengthy record, and has no special right to misstate the record, fail to correct errors, or conceal corrections in a single euphemistic expression that hides their demonstrable significance.

The chart that follows compares the arguments made in the government's appellate brief, the factual statements of the court of appeals, and the corrected factual statement made (implicitly and definitely) in the Brief in Opposition:

Government's Brief Court of Appeals	Court of Appeals' Opinion	Brief in Opposition in this Court
Hobson stood by while marijuana was weighed and counted and he immediately removed his load (p. 137)	He was in stash houses on numerous occasions (App. 39)	Implicit concession —Hobson never stood by while marijuana was weighed and counted (p. 23)[1]
Hobson was constantly ready to take large loads (pp. 137-38)	Hobson frequently purchased marijuana from the enterprise (App. 39)	Implicit concession —no evidence that Hobson stood ready to purchase (p. 23); in fact, he purchased at most twice[2]
Hobson had 25-30 dealings with the enterprise (p. 137)	Hobson purchased marijuana on 25-30 occasions from the enterprise (App. 38)	Hobson purchased at most twice; he dealt with the accountant, not to purchase marijuana, on 25-30 occasions (p. 21)[3]
Two airplane ventures should be considered together (pp. 29-31)	Hobson was involved with two related airplane ventures (App. 36, 47)	Hobson had nothing to do with the first airplane venture (p. 7)[4]

[1] This error affected four of the six counts against Hobson: the two RICO counts (1, 2), the conspiracy to import marijuana (3), and the conspiracy to possess marijuana with intent to distribute (5). The only basis for the court of appeals' finding of Hobson's knowledge of importation was the erroneous assumption concerning his presence while marijuana was brought to warehouses, weighed and stored.

[2] The trial evidence clearly showed that Hobson purchased marijuana twice at most prior to his downpayment on an additional quantity which he never received and which is the subject of counts 4 and 10. The Brief in Opposition (page 3) now concedes that Abbey kept detailed records of purchases (page 6). Abbey testified for the

(footnote continued on next page)

This Court need not speculate as to the importance of the court of appeals' misapprehensions of facts. That court stated explicitly that it found sufficient evidence that petitioner knew of importation because of his frequent dealings with the enterprise and his presence at locations where the marijuana was counted and weighed (App. 39)—facts that the government now concedes are false. The court of appeals indicated that it would not have affirmed petitioner's conviction for conspiracy to possess marijuana with intent to distribute if he had been a purchaser only occasionally (App. 38)—but it was misled into believing that there were 25-30 purchases rather than simply one or two. And the court of appeals emphasized that it believed petitioner was involved in two airplane ventures, which it found critical to its analysis of the charges generally and particularly to its conclusion that petitioner had aided and abetted the "Constellation" venture (App. 36, 47)—while the government now concedes that petitioner had nothing whatever to do with the first airplane incident.

(footnote continued from preceding page)

government that there were approximately ten loads of marijuana in all (40 R. 49-50) and that Hobson bought only once (34 R. 140-44). Cobb, the leading government witness, testified that Hobson purchased twice (38 R. 154, 158, 164). There was no testimony that Hobson was a regular purchaser or that he stood ready to purchase. This mistake affected the court of appeals' consideration of all counts except 4 and 10.

[3] The court of appeals, which relied upon its misapprehension that Hobson had purchased 25 or 30 times, was confused by this mistake on all counts except 4 and 10.

[4] The court of appeals' erroneous assumption that Hobson was involved with the first airplane venture (the DC-3 seized in January, 1979 at Fort Lauderdale) was the sole basis for its conclusion that Hobson had aided and abetted the importation and possession of marijuana on the Constellation (counts 4 and 10).

The government has conceded error before and asked this Court to accept its representation that the error was harmless. *See, e.g., Moore v. United States*, 429 U.S. 20, 22 (1976) (Solicitor General conceded hearsay error but asked Court to call it harmless; Court remanded instead). Now, the government wants to do more; it concedes error softly and quietly and offers a single euphemism instead of a candid recitation of its "imprecise" statements in the court of appeals. It asks that this Court permit it, rather than the federal judiciary, to decide whether its mistakes which produced such serious factual errors in the court of appeals were harmless. But review is a judicial function, not an executive one.

Petitioner believes, as do the amici National Association of Criminal Defense Lawyers and the National Legal Aid and Defenders Association, that it is vital to the integrity of the federal judiciary and to fundamental notions of due process that any litigant be required to correct errors made in legal papers filed with federal courts when the errors have been specifically called to the litigant's attention and there is time to respond. The government indicates that this is a good idea, but apparently it is unwilling to say that it should be required (Gov. Br. at 19-20 n.10.). Like the national organizations that watch this case with great anticipation, petitioner wishes this Court would announce as a rule the duty to correct identified errors in a timely fashion. Such an announcement would work toward assuring accurate and fair decisions at every level of the judiciary.

II. MARIJUANA IS NOT WITHIN THE COVERAGE OF RICO.

Whether RICO includes marijuana offenses is unquestionably an issue of major importance. Yet, the government's response seeks to have this Court deny certiorari solely on the basis of its earlier denial in *Gustafson v. United States*, 105

S.Ct. 957 (1985).[5] But there are critical differences between the petitions in *Gustafson* and the instant cases.

Unlike Gustafson's petition, the application in No. 84-1403 contains an exhaustive analysis of the legislative history of RICO. Yet the government, having received three unopposed extensions of time, finds no contrary authority.

Unlike the petition in *Gustafson*, the author of the very bill which is under consideration is of counsel in No. 84-1148. Professor Blakey, the principal author of the federal wiretap statute which explicitly covers marijuana, and the principal author of RICO which contains identical language to Title III except for the omission of marijuana, has repeated his long-held understanding that it was not the intent of Congress to include marijuana within RICO's coverage (No. 84-1148 Pet. at 8-9 & n.7). Yet the government ignores Blakey's statements.

Rather than respond to the legislative history or to Blakey's appearance of counsel, the government argues that this Court would be justified in extending RICO to marijuana offenses because RICO should be liberally construed (Gov. Br. at 10). Such an argument is an invitation to lawlessness. If Congress removed marijuana from the coverage of RICO, no court, not even this one, would be warranted in adding it. Such a "construction" would remove principled limits from statutory interpretation.

Petitioner submits that judicial economy will be well served if this Court reviews the RICO issue now. The government, on the strength of the Eleventh Circuit opinion, will continue to prosecute RICO offenses involving

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[5] The only new government argument asserts that RICO was not applied to marijuana cases prior to *Turkette* because of the uncertainty whether RICO reached wholly unlawful activity (Gov. Br. at 11). The weakness of this argument is demonstrated by the fact that no court, before or after *Turkette*, dismissed a RICO/marijuana case on the theory that marijuana transactions were wholly unlawful.

marijuana, and defendants will continue to challenge RICO's application to marijuana. The same legislative history cited to this Court will be cited to the lower courts. They will be compelled to make the same statutory analysis that this Court would make if it granted review. Surely, an issue of this importance is better reviewed sooner rather than later.

III. TWO OFFENSES ARISING FROM THE SAME ACT CANNOT CONSTITUTE A PATTERN OF RACKETEERING ACTIVITY.

In his petition, Hobson argued that the court of appeals had seriously misconstrued the RICO statutes when it found a pattern of racketeering activity from a single act. The court of appeals believed that since petitioner's single act, the attempted purchase of a load of marijuana, had given rise to two felonies, importation and possession with intent to distribute, the pattern requirement of 18 U.S.C. § 1961(5) had been satisfied (App. 39-40).

The government, as did the Eleventh Circuit, characterizes petitioner's argument as asserting a "one transaction" theory—a theory which petitioner expressly disavowed and which has been repeatedly rejected by the lower courts. In no case has a racketeering pattern been created from the commission of a single act. Petitioner's single attempt to purchase marijuana, unlike the multiple acts involved in every case cited by the government and the Eleventh Circuit, does not come within the "pattern" definition provided by this Court in *United States v. Turkette*, 452 U.S. 576, 583 (1981): "[A] pattern of racketeering activity is . . . a *series of criminal acts* as defined by the statute" (emphasis added). It is almost tautological to note that a series of criminal acts is not a single act, regardless of how many felonies may be charged from it.

RICO cases have mushroomed in the civil and criminal courts of this country. Each of these necessarily involves compliance with the pattern requirement of 18 U.S.C. § 1961(5). This Court will not have a better case in which to

clarify the racketeering pattern definition. There is no dispute that the only predicate act upon which petitioner's RICO convictions were based is his attempted purchase of marijuana (App. at 39-40 n.14).

Nor is there any dispute that under appropriate circumstances a single act may lead to multiple charges (No. 84-1148 Pet. at 14). The discrete legal issue clearly presented is whether the RICO pattern requirement is satisfied by one act when it leads to more than one felony charge. Certiorari should be granted to resolve this important federal question.

IV. THE WIRETAPS WERE UNLAWFUL.

A. Applications To Amend Wiretap Orders Must Be Submitted By Authorized Persons.

The Brief in Opposition makes three responses: (1) this issue was not raised at trial; (2) the case law allows applications by police officers; and (3) there is no authority for the proposition that amendment applications are to be treated as original applications (Gov. Br. at 18 n.7). The government is manifestly wrong in each response.

The lack of authorization was raised in a pretrial motion to suppress (3 R. 491) joined by all defendants (4 R. 798; 8 R. 1925). The motion expressly asserted that the person making the applications was not properly authorized and that the amendment applications were incorrectly submitted (3 R. 507-10).

The case law submitted by the government approving applications by police officers is embarrassingly inapposite. In both *Alexander v. Harris*, 595 F.2d 87, 89 (2d Cir. 1979), and *United States v. Harvey*, 560 F. Supp. 1040, 1078 (S.D. Fla. 1982), the officers had written authorization from the principal prosecuting attorneys. In petitioner's case, no such authorization existed.

Last, an opinion of the First Circuit is clear authority that the principal prosecuting attorney is required to authorize amendment applications. In *United States v. Smith*, 726 F.2d

852 (1st Cir. 1984) (en banc), the court analyzed amendment applications, including one to change a telephone number, 726 F.2d at 868, in precisely the same fashion that it analyzed original and renewal applications. It did not approve a lesser standard for amendment applications.

Thus, the Eleventh Circuit has placed itself in conflict with the First Circuit.

B. Applications To Amend Wiretap Orders Must State Probable Cause For The New Order.

The government claims that Hobson requires certification to state courts whenever any issue of state law arises (Gov. Br. at 17 n.6). In fact, Hobson argues that where there is no clear and controlling state precedent on a dispositive constitutional issue, and where state courts have a well-established mechanism promoting certification,[6] the failure to certify is so serious a departure from the accepted and usual course of judicial proceedings as to require a supervisory grant of certiorari.

The government has also suggested that petitioner raised this issue too late (*id.*). Had petitioner known that the Eleventh Circuit would interpret Florida law contrary to the only interpretation offered by the parties, he would of course have earlier suggested certification. This absence of parties' dispute on Florida law distinguishes this case from *Lehman Brothers* v. *Schein*, 416 U.S. 386, 392-95 (1974) (Rehnquist, J., concurring).

V. DISQUALIFICATION OF PETITIONER'S TRIAL COUNSEL REQUIRES A NEW TRIAL.

The government does not respond to the merits on this issue; instead, it claims that (1) petitioner failed to raise this issue in the court of appeals, and (2) the trial court found that counsel had a conflict of interest (Gov. Br. at 24). The record contradicts both claims.

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[6] *See* Fla. Stat. § 25.031 (1983); Fla. R. App. P. 9.150 (1980).

The issue was raised in petitioner's brief in the court of appeals (*see* Brief of Appellant Hobson at 41 & n.29) and in his Suggestion for En Banc Consideration of the Issue of Disqualification of Counsel, filed concurrently with his appellate brief (Reply App. 1-15).

In its written order disqualifying counsel, the trial court never stated that it was finding facts; instead, it carefully limited its concern to the effects of the testimony the government represented it would elicit: "Once testimony about Taylor's involvement came before the jury, its members could not help but wonder if the lawyer is protecting himself or his client" (8 R 1889-90). The court disqualified counsel based upon the government's misrepresentations of the testimony it would adduce.

In the trial court, the government successfully misled the judge and secured disqualification of petitioner's counsel. In the appellate court on pretrial appeal, the government successfully convinced the Eleventh Circuit that such testimony would require disqualification. In this Court, the government claims that the issue was not raised on post-trial appeal in the Eleventh Circuit and that the trial judge was not misled by the government. Petitioner prays that this most recent government effort will not be successful.

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APPENDIX

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. **RUSSELL HOBSON, et al.,** *Defendants-Appellants.*	On appeal from the United States District Court for the Northern District of Florida. **No. PCR 81-440** Honorable **Lynn C. Higby,** Judge Presiding

HOBSON'S SUGGESTION FOR EN BANC CONSIDERATION OF THE ISSUE OF DISQUALIFICATION OF COUNSEL

STATEMENT OF THE ISSUES

Is a defendant entitled to a due process hearing when a prosecutor moves to disqualify defense counsel for the "appearance of impropriety?" Does a defendant have a Sixth Amendment right to challenge the truthfulness and trustworthiness of the prosecutor's assertions upon which the court is asked to rely? What burden must the movant meet to be entitled to an order disqualifying opposing counsel?

The panel impliedly answered the first two questions "no." It did not address the third issue.

STATEMENT OF PROCEEDINGS

Hobson was convicted by a jury in *United States* v. *Villanueva*, No. PCR 81-440 (N.D. Fla. 1982) (hereinafter "Sunburn I"), on six counts relating to illegal importation and distribution of marihuana. His appeal from judgment of conviction is now pending before this Court.[1]

Prior to the Sunburn I trial, the court granted the government's motion to disqualify Hobson's trial counsel. The order was affirmed by this Court in *United States* v. *Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied*, 103 S.Ct. 208 (1982).

This Suggestion for En Banc Consideration has been filed pursuant to Fed. R. App. P. 35(b) and 11th Cir. R. 26. Because it suggests that an appeal be heard initially en banc, it is filed prior to submission of the appellee's brief. Fed. R. App. P. 35(c).

STATEMENT OF FACTS

Two months prior to the Sunburn I trial, the court held a hearing on the government's motion to disqualify Hobson's counsel, Clyde M. Taylor. During a lengthy colloquy with Hobson, the trial court identified specific problems that might result if Taylor were to continue to represent Hobson. The judge included the possibility that the jury might infer Hobson's guilt from the potential testimony of two witnesses, Robinson and Alexander, who implicated Taylor in criminal

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[1] Hobson's brief in support of his appeal from judgment of conviction is being filed on the same date as this Suggestion for En Banc Consideration.

conduct, claiming that he knew they had discussed unloading marihuana (4th Supp. at 31–33).[2] The trial court advised Hobson that Taylor's continued representation would not be in Hobson's best interest (*id.* at 33). Despite these warnings, Hobson repeatedly acknowledged his understanding of the potential conflicts and expressed his desire to be represented by Taylor (*id.* at 31, 32, 33, 34).

Ruling from the bench, the court disqualified Taylor (*id.* at 27, 34). In a written order the court stated that the allegation that Taylor knew of illegal marihuana importation, if true, created an appearance of impropriety in violation of Canon 9 of Florida's Code of Professional Responsibility (Vol. 8 at 1887).[3] The court refused to accept Hobson's waiver of prejudice (*id.* at 1890).

The district court's decision was affirmed by a divided panel in *United States* v. *Hobson*, 672 F.2d 825, which noted that the disqualification order was "based factually upon affidavits of two witnesses, Robinson and Alexander, whom the government represents will testify in Hobson's upcoming trial." 672 F.2d at 826.

According to affidavits the government procured from Robinson and Alexander, they had been in Taylor's office and had discussed the possibility that Robinson could participate in off-loading marihuana. These discussions took

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[2]The Record on Appeal is cited in this Suggestion as "Vol. __ at __ " or "__ Supp. at __ ." Transcripts not contained in the record are referred to as "Tr."

[3]Rule 5(F) of the United States District Court for the Northern District of Florida adopts the Florida Code of Professional Responsibility. *See also Norton* v. *Tallahassee Memorial Hosp.*, 689 F.2d 938, 940 n.3 (11th Cir. 1982).

place while Taylor was in and out of the office. (The text of the affidavits is set forth in Exhibits A and B, herein.)

The panel noted, "it is reasonable to expect that [Robinson and Alexander] will testify as to the same allegations made in their affidavits." 672 F.2d at 828. Upon this assumption, the panel concluded that such testimony in a trial in which Taylor represented Hobson could erode public confidence in the integrity of the bar and the legal system. It further held that Canon 9 was designed to prevent such erosion and affirmed the order disqualifying Taylor. *Id.* at 829.[4]

Robinson and Alexander were called as government witnesses at Hobson's trial but on direct examination neither testified to the alleged off-loading discussions in Taylor's office. The only testimony concerning that matter was elicited on cross-examination by defendant James' attorney, who questioned Robinson about the incident to lay a foundation for impeachment by prior false testimony (Vol. 31 at 186–190).[5]

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[4] Hobson respectfully asserts *infra*, that the Sixth Amendment gives him the right to challenge the reasonableness of this expectation and the truth and admissibility of the expected testimony upon which the court would rely to deprive him of his lawyer.

[5] In his grand jury testimony, Robinson's version of the off-loading discussion placed him and Alexander in one room and Taylor in another (Vol. 31 at 188-189). He did not testify that Taylor went in and out of the room used by Alexander and Robinson, nor that Taylor could have heard their discussion.

ARGUMENT

A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO A HEARING ON THE TRUSTWORTHINESS OF THE FACTS UPON WHICH A COURT IS ASKED TO RELY WHEN THE PROSECUTOR SEEKS TO DISQUALIFY DEFENSE COUNSEL BECAUSE OF AN APPEARANCE OF IMPROPRIETY.

Robinson and Alexander testified at Hobson's trial but were never asked by the government about discussions of marihuana activities in Clyde Taylor's office. This casts serious doubt on the government's good faith in bringing the motion to disqualify Taylor. Evidence raising an appearance of impropriety which the government implied would be presented at Hobson's trial was not and Hobson went to trial without Taylor.[6]

Defendants in criminal cases will continue to go to trial without their chosen advocates so long as the panel decision in *Hobson* remains the law of this Circuit. The panel decision allows the government to manipulate a defendant's choice of counsel whenever it has potential witnesses who will execute an appropriate affidavit. This Court's comment that attorneys "now commonly use disqualification motions for purely strategic purposes," *Woods* v. *Covington Cty. Bank*, 537 F.2d 804, 813 (5th Cir. 1976), illuminates the government's conduct in this case. The government, like this Court, recognizes that a defendant "is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine." *Id.* Prosecutors will remain free to manipulate defendants'

[6] It is reasonable to question whether there was ever a need for the testimony or if, instead, it simply provided a handy vehicle to eliminate experienced counsel.

choice of counsel unless this Court, *en banc*, changes its apparent position on disqualification motions filed by the government.

In *United States* v. *Snyder*, 707 F.2d 139 (5th Cir. 1983), the Court stated that disqualification may be on one of two grounds: conflict of interest or integrity of the judicial system. 707 F.2d at 145. Neither is absolute: some conflicts may be waived by clients, *see United States* v. *White*, 706 F.2d 506 (5th Cir. 1983), and in some cases the defendant's interest in counsel of choice may outweigh a more limited public interest in maintaining the appearance of integrity of the judicial process. *Cf. Snyder*, 707 F.2d at 145 n.5.

When the "integrity of the system" basis is invoked, a two-pronged test is to be used: first, although there need not be proof of actual wrongdoing, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Woods*, 537 F.2d at 813. Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813 n.12. Under Canon 9, an attorney may be disqualified only when both of these criteria have been met. *Id.*

The *Woods* test is adequate; it is in the application of this two-pronged test that the Sixth Amendment requires a different approach. The "reasonable possibility" standard for the existence of impropriety is overly permissive when disqualification motions are made in criminal cases. Because the "interest in permitting a criminal defendant to retain counsel of his choice is strong and deserves great respect," *Hobson*, 672 F.2d at 828; *see also Snyder*, 707 F.2d at 145 n.5, a

due process hearing should be held before a trial court grants a government motion to disqualify defense counsel.

An adversary hearing should precede findings concerning either prong of the *Woods* test and should follow a procedure common to other motions *in limine*: the prosecutor announces his intention to introduce at trial evidence pertinent to disqualification; the defense objects either if it is disputed or if it is claimed to be irrelevant or otherwise inadmissible; and the trial judge resolves the dispute. If the evidence is not admissible, the inquiry may end. If the evidence is admissible, a hearing can be held to test the trustworthiness of the evidence which the government claims to possess. The court would be required to find substantial evidence[7] that a "specifically identifiable impropriety did in fact occur." *Woods*, 537 F.2d at 813.

This procedure reasonably accommodates the sometimes conflicting values of the defendant's fundamental right to counsel of choice and the court's obligations to guard against conflicts of interest and to protect the integrity of the judicial system.

It should be noted that, the government never represented that it would present at trial the testimony of Robinson and Alexander on the Taylor allegations (Vol. 5 at 1189). The

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[7]Similar procedures are presently required when other Sixth Amendment rights are implicated by the government's proposed evidence. *See, e.g., United States* v. *James*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979).

district court assumed it would be presented,[8] and this Court followed suit.[9]

On a motion to disqualify Taylor from representing a defendant in *United States* v. *Acosta*, No. MCR 82-220 (N.D. Fla. 1982) ("Sunburn II"), the same trial judge noted the absence of the predicted testimony from the Sunburn I trial and recognized, albeit too late for Hobson, that the testimony would have been inadmissible during the government's case:

> THE COURT: Well, that's what I'm wondering. In the last case Robinson and Alexander were witnesses and did testify. They did not testify anything concerning the discussion they had, alleged to have been had with Taylor in his office. It was really irrelevant. [sic][10]

(Sunburn II Tr. of Oct. 7, 1982, Vol. II at 5.)[11]

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[8] The district court stated: "Once testimony about Taylor's involvement came before the jury its members could not help but wonder if the lawyer is protecting himself or his client" (Vol. 8 at 1889-90).

[9] This Court stated: "[I]t is reasonable to expect that [witnesses Robinson and Alexander] will testify as to the same allegations made in their affidavits. This testimony will portray Hobson's attorney . . . and . . . will impugn severely his integrity and credibility in the eyes of the jury." 672 F.2d at 828.

[10] In the instant case Taylor had argued lack of relevance in his Response to Motion to Disqualify Counsel. (Vol. 8 at 1851.)

[11] The government's motion to disqualify Taylor in Sunburn II was denied (Sunburn II Tr. of Oct. 7, 1982, Vol. II at 29). This Court may take judicial notice of the Sunburn II transcript pursuant to Fed. R. Evid. 201 because it is a part of the record of proceedings in a closely related case in an inferior court. *ITT Rayonier Inc.* v. *United States*, 651 F.2d 343, 345 n.2 (5th Cir.

(footnote continued on next page)

In assuming that the testimony of Robinson and Alexander concerning Taylor would be presented to the jury, both the trial court and this Court made at least passing reference to the weaknesses of the assumed testimony.[12] These weaknesses went directly to the heart of the prong of the disqualification test that requires a prediction of public suspicion or obloquy. [13]

(footnote continued from preceding page)

1981) (Unit B); *Rodic* v. *Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *St. Louis Baptist Temple* v. *F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1277 n.33 (5th Cir. 1978).

[12] The district court stated: "They are only affidavits and not conclusive. Both are statements of convicted felons. And Robinson's contradicts his Grand Jury testimony" (Vol. 8 at 1888-89). This Court stated: "Even though the [affidavits'] allegations may be false" 672 F.2d at 828.

[13] The majority's citations to *Woods* v. *Covington Cty. Bank*, 537 F.2d 804, *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 641 (2d Cir. 1974), and *United States* v. *Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964), for the proposition that attorneys have been disqualified for the appearance of impropriety, even when there was no evidence of actual wrongdoing, is puzzling. 672 F.2d at 828. *Woods* contained no such holding and, in fact, created a test expressly designed to protect against such baseless disqualifications which, the Court noted, were prompted more by opposing counsel's strategy than by concern for ethical or propriety considerations. Additionally, all three cases involve disqualification motions premised on an attorney's prior involvement with a case during government employment, an issue not present here. Finally, and most significantly, all three cases are civil cases which do not implicate the Sixth Amendment.

Russell Hobson was deprived of his counsel of choice upon a panel majority's application of the *Woods* two-pronged test. Neither part of the test was the subject of an evidentiary hearing and both parts were resolved incorrectly. The major premise of the panel decision was expressed at the conclusion of the majority opinion:

> Although the allegations in the affidavits may be untrue in fact, *once the testimony is heard by the jury* the damage will have been done—such testimony very likely could result in erosion of public confidence in the integrity of the bar and of the legal system, and this erosion is precisely what Canon 9 is designed to prevent.

672 F.2d at 829 (emphasis added). The key to this holding was the assumption that the evidence would be *heard by the jury*. Before counsel is disqualified in a criminal case, trial judges must have more than an assumption that damaging testimony will be heard by a jury. Clyde Taylor should not have been disqualified.

A panel of this Court has placed an awesome weapon in the hands of every prosecutor in the Eleventh Circuit who feels that a defendant's conviction will be more probable if his defense counsel is disqualified. The power to remove an adversary's lawyer is the power to control litigation.

The panel's opinion invites endless and unseemly disputes in which prosecutors protest their good faith in making recusal motions and defendants charge them will deliberate emasculation of the Sixth Amendment.

This Court *en banc* should reconsider the impact of its panel's opinion and protect the prosecutors in this Circuit from the temptation to which they are now exposed. A new trial should be ordered.

CONCLUSION

For all of the foregoing reasons, Hobson respectfully suggests that the issue of the pre-trial disqualification of his chosen trial counsel be heard by this Court *en banc* and that a new trial be ordered.

Respectfully submitted,
RUSSELL HOBSON,
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Dated: August 25, 1983

AFFIDAVIT OF PATRICK ROBINSON

During late December, 1978 or early January, 1979, I met Clyde Taylor at his office to discuss a pending case in which Taylor was representing me on Florida State charges of possession of more than 100 pounds of marijuana. This case later came to be known as the Tallahassee warehouse case. I also discussed with Taylor about Taylor getting in touch with Tom Alexander for the purpose of getting me work unloading marijuana. Taylor indicated that he would contact Alexander. During the conversation, Alexander came to Taylor's office and joined us. Alexander and I discussed a load of marijuana that had recently been seized and discussed my going to work for him in the near future on another load of marijuana that was coming into the North Florida area. (I subsequently learned from Taylor or John Daniel, attorney, that the load had been seized in Panama City, Florida.) During my conversation with Alexander, Taylor was in and out of the office and had full knowledge of what we were discussing.

/s/ PATRICK L. ROBINSON

Notarization

EXHIBIT A

AFFIDAVIT OF THOMAS E. ALEXANDER
(Original hand-written)

By request of; The United States Attorneys Office, Pensacola, Florida.

The following events that took place in and around Tallahassee, Florida during late January and early February 1979; are true to the best of my knowledge.

During the period of late Jan. '79 and early Feb. '79 I was in the Panama City Florida area waiting for a small plane load of marijuana that was to land at the Tri-County Airstrip. I was told that the plane had developed problems in South America thus the stateside landing never developed.

Traveling by automobile from Panama City to Ft. Lauderdale, I made a telephone call to Clyde Taylor, an attorney in Tallahassee, Fla. The telephone conversation with Mr. Taylor was not to report the failure of the Tri-County load, but to establish Mr. Taylors availability so that I could make an appointment. Mr. Taylor stated he was available and that [I] could come to his office.

When I arrived at Mr. Taylors office [he] was talking to a mutual acquaintance by the name of Pat Robinson. In Mr. Taylors pressence (sic) I discribed (sic) the reasons and related some of the details of the Tri-County failure [to] Mr. Robinson.

(See page two)

EXHIBIT B

AFFIDAVIT OF THOMAS E. ALEXANDER
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While Mr. Robinson and I were engaged in another conversation, Mr. Taylor was in and out of his office. It was during this time that I was relating the possibility of him (Mr. Robinson) off-loading [a] Constellation airplane load of pot should [he] be needed in the near future. Toward the end of my conversation with Mr. Robinson, Mr. Taylor returned to his office; was present, and I feel reasonably sure that he (Mr. Taylor) had full knowledge of the context of my conversation to solicit Mr. Robinson (sic) services.

Mr. Taylors pressence (sic) during my conversation was by no means threatning (sic) to what I was discussing with Mr. Robinson, therefore I didn't feel compelled to curtail it in Mr. Taylors company.

The plane that Mr. Robinson and I were talking about was a constellation aircraft that was apprehended at the Panama City Airport on or about February 14, 1978.

/s/ THOMAS E. ALEXANDER

Notarization

CERTIFICATE OF SERVICE

I, James M. Shellow, an attorney, certify that I caused a copy of the foregoing document, Hobson's Suggestion for En Banc Consideration of the Issue of Disqualification of Counsel, to be served upon all counsel of record in this matter on August 25, 1983.

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JAMES M. SHELLOW